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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

STENSON TAMADDON, LLC

Plaintiff,

v.

UNITED STATES INTERNAL
REVENUE SERVICE; THE UNITED
STATES OF AMERICA; UNITED
STATES DEPARTMENT OF
TREASURY; DANIEL WERFEL, in his
official capacity as Commissioner of the
U.S. Internal Revenue Service; and
JANET YELLEN, in her official
capacity as Secretary of the Treasury,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF, AND
WRIT OF MANDAMUS RE:**

1. Violation of the APA [5 U.S.C. § 553]
2. Violation of the APA [5 U.S.C. §§ 706(2)(A) & (C)]
3. Violation of the APA [5 U.S.C. §§ 706(1), (2)(C)]
4. Relief under the Mandamus Act [28 U.S.C. § 1361]

COMPLAINT FOR INJUNCTIVE RELIEF AND WRIT OF MANDAMUS

1. This is an action for injunctive relief and mandamus under the Administrative Procedure Act (5 U.S.C. § 701, *et seq.*) and the Mandamus Act (28 U.S.C. § 1361).

2. Congress charged the U.S. Department of Treasury and the Internal Revenue Service with implementing portions of the Coronavirus Aid, Relief, and

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1 Economic Security Act (“CARES Act”) of 2020. *See* 15 U.S.C. § 9006; 26 U.S.C. §
2 3134(m). Among the programs created by Congress, the IRS was tasked with
3 reimbursing businesses through the Employee Retention Credit (“ERC”) program.

4 3. The ERC is a broad-based, fully refundable tax credit designed to stimulate
5 economic recovery, support job retention, encourage business sustainability, and mitigate
6 the impacts on small business from the unprecedented challenges the pandemic posed.
7 Congress intended for the credit to be broadly applicable to help businesses through a
8 historic pandemic that disrupted the global economy. The IRS has failed Congress and
9 American businesses in its role as steward of the ERC program.

10 4. The IRS has improperly restricted the availability of ERC payments based
11 on unlawful legislative rules that were issued in violation of the APA, 5 U.S.C. § 553(b).
12 Congress afforded the IRS rulemaking authority under the CARES Act. *See* 26 U.S.C. §
13 3134(m). But instead of issuing regulations, the IRS legislated improperly through
14 guidance documents, thereby bypassing the mandatory notice-and-comment rulemaking
15 process and eliminating the transparency and deliberation it offers. By doing so, the IRS
16 stripped taxpayers of their right to participate.

17 5. Among other unlawful legislative rules, the IRS issued “Notice 2021-20,”
18 a purported guidance document that improperly narrowed the ERC statutory scheme
19 thereby depriving otherwise eligible small businesses of the ERC payments they are
20 entitled to under Section 3134.

21 6. The IRS now treats its improperly issued guidance as binding legislative
22 authority, elevating it to be treated by its employees as infallible law. The Service
23 routinely cites Notice 2021-20 when denying ERC claims. The IRS’s reliance on that
24 Notice has prevented thousands of taxpayers from collecting financial relief Congress
25 guaranteed to them under the statute.

26 7. Congress did not grant the IRS authority to alter the statutory scheme in this
27 way. The Service’s restriction of ERC eligibility by way of Notice 2021-20 and other
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1 “guidance” was “in excess of [its] statutory jurisdiction, authority, or limitations.” *See*
2 U.S.C. §§ 706(2)(C).

3 8. What’s more, the IRS adopted substantive positions in Notice 2021-20
4 without providing a reasoned explanation. The Service’s adoption of substantive
5 positions that materially changed the statutorily created ERC program through guidance
6 was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
7 law.” *See* 5 U.S.C. § 706(2)(A).

8 9. Plaintiff asks that the Court vacate the unlawful Notice 2021-20 and enjoin
9 the IRS from enforcing it absent compliance with the APA.

10 10. Finally, the IRS improperly suspended the ERC program in violation of its
11 statutory mandate to refund American businesses under the Congressionally enacted
12 program. *See, e.g.*, 26 U.S.C. § 3134. In September 2023, the IRS announced it was
13 suspending its review and processing of new ERC claims indefinitely. The IRS originally
14 suggested this unlawful moratorium would end, and processing would resume, at the
15 beginning of 2024. Yet even as of this filing, over seven months later, the IRS still has
16 not ended its unilateral, ultra vires moratorium on ERC claims.

17 11. Although the IRS says that it continues to process claims filed before the
18 moratorium began on September 14, 2023, it has done so “at a greatly reduced speed.”
19 In practice, the Service has processed very few ERC claims since the moratorium began.
20 The ERC program is effectively suspended in its entirety.

21 12. While Congress bestowed the IRS with regulatory tools to manage, process,
22 and operate programs under the CARES Act, Congress did not delegate to the IRS the
23 legislative authority to alter or disregard its statutory obligations. The moratorium places
24 on indefinite hold thousands of legitimate claims by businesses that qualify for ERC under
25 26 U.S.C. § 3134. The moratorium has dissuaded businesses from filing legitimate ERC
26 refund claims. The IRS has deprived and continues to deprive taxpayers of due process
27 of law by staying the ERC program indefinitely without affording tax filers a pathway to
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1 resolve or collect payments that are due under the ERC program at the administrative
2 level.

3 13. Plaintiff asks that the Court declare the IRS moratorium unlawful; compel
4 the Service to process ERC claims filed during the moratorium consistent with the
5 CARES Act; and compel the Service to timely process ERC claims filed before the
6 moratorium began, as required by the CARES Act and the Internal Revenue Code.

7 **I. PARTIES**

8 **A. The Plaintiff**

9 14. Stenson Tamaddon, LLC (“StenTam”) is a multifaceted tax advisory and
10 technology firm that assists businesses with tax credits and financial solutions. Based in
11 Phoenix, Arizona, StenTam provides its national client base with solutions for identifying
12 and seeking tax credits and government incentives.

13 15. StenTam operates as a consultant under the ERC program by helping
14 businesses file ERC claims. StenTam is compensated from the proceeds of credits
15 refunded to its clients. StenTam’s services extend to defending claims that are challenged
16 by the IRS. If a filed claim is disallowed, StenTam does not receive compensation for
17 services on that submission.

18 16. As part of its business model, StenTam works with businesses to evaluate
19 eligibility under the ERC program. StenTam has dedicated significant resources to
20 ensuring compliance with all policy positions the IRS releases with respect to the ERC.
21 For example, when the IRS publishes guidance documents concerning ERC eligibility or
22 claim procedures, StenTam must adjust its business practices to account for the new
23 developments. Those adjustments require investment of professional resources at
24 considerable cost, including legal fees, research-related efforts, implementation costs, and
25 human resource expenses.

26 17. As a business that depends on ERC refunds for a source of revenue,
27 StenTam is directly injured by IRS positions that unlawfully narrow or limit the
28 availability of ERC for businesses. When the IRS improperly narrows the eligibility

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criteria for ERC through legislative rules, StenTam suffers a commensurate loss of income and business opportunity. Likewise, when the IRS unlawfully suspended the ERC program in September 2023, StenTam lost the ability to receive compensation for work performed on behalf of clients that have ERC claims under 26 U.S.C. § 3134, by suspending refund payments to those clients, from which StenTam would in turn be paid.

18. The IRS has denied ERC refunds to StenTam clients based on unlawfully issued rules, like Notice 2021-20, that improperly narrowed eligibility criteria under the ERC program outside of the APA. StenTam is obligated to assist its clients in the pursuit of those credits at the administrative level. The IRS's unlawful guidance reduces StenTam's compensation for services rendered, prevents StenTam's clients from recovering refunds owed under the plain text of 26 U.S.C. § 3134, and imposes administrative costs on StenTam as it supports client claims before the agency.

19. Taken together, the IRS's unlawful approach to ERC eligibility and claims processing has cost StenTam millions in revenue.

20. A decision invalidating or vacating the IRS's unlawfully issued ERC rules will redress StenTam's injury by lifting barriers to refundable credits to which StenTam's clients are entitled under the statute. Mandamus relief should compel IRS officials to process the legitimate claims of American businesses entitled to refunds under the statute and will absolve StenTam of certain potential liabilities.

B. The Defendants

21. Defendant the IRS is an agency within the Executive Branch of the United States Government organized within the Department of Treasury. The IRS is an agency within the meaning of 5 U.S.C. § 701(b)(1).

22. Defendant Danny Werfel is the Commissioner of the IRS. In his capacity as Commissioner, Mr. Werfel establishes, enforces, and interprets tax administration policies, including through IRS guidance known as "Notices."

23. The United States Department of the Treasury is an arm of the Executive Branch of the United States Government that oversees the IRS.

24. Defendant Janet Yellen is the Secretary of the Treasury.

II. JURISDICTION AND VENUE

25. This Court has original subject matter jurisdiction over this cause of action under 28 U.S.C. § 1331 and 5 U.S.C §§ 702, 704, and 706 as to all claims arising from federal law, interpretation of federal statutes, rules, regulations, orders, and the Constitution.

26. Venue is proper under 28 U.S.C. § 1391(e)(1), as Defendants are employees of the United States, Plaintiff maintains its principal place of business in this district in Phoenix, AZ, and a substantial part of the events giving rise to this action occurred in this district as explained below.

27. Plaintiff files this action timely under 28 U.S.C. § 2401(a) and 5 U.S.C. § 704 because the claims are brought within six years after the right of action first accrued.

III. BACKGROUND

A. Congress Enacts the Employee Retention Credit Program and Directs the IRS to Facilitate It.

28. Beginning in 2020, COVID-19 swept through all fifty states and resulted in governmental orders that disrupted the United States' local and national economies. Those orders formed a nexus of federal, state, and local government mandates that created a comprehensive regulatory scheme limiting commerce, travel, and group meetings with the objective to limit the spread of COVID-19. The governmental response to that public health emergency involved historically unprecedented measures, including lockdown orders, social distancing mandates, and forced business closures. The profound economic effects of those policies were apparent. Deemed the “greatest threat to prosperity and well-being the US has encountered since the Great Depression[,]” the estimated cumulative financial costs of COVID-19 were forecast at \$16 trillion.¹

¹ See David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the*

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29. Those realities led the federal government to enact sweeping economic measures to assist American businesses and citizens. Through emergency measures like the Paycheck Protection Program (“PPP”) and Economic Impact Payments, the government authorized direct payments to households and businesses on expedited timelines. Congress intended the remedial measures to have a broad effect.

30. The broad remedial purpose of the CARES Act, and specifically the ERC, was discussed by voting members of Congress who outlined the need for sweeping relief.²

31. The statutory goal was to put money in the hands of citizens and businesses at an unprecedented speed, in a critical time of need. For instance, the CARES Act provided Economic Impact Payments of up to \$1,200 per eligible adult and \$500 each qualifying child under age 17. H.R. 748, 116th Cong. § 6428(a) (2020). The Tax Relief Act of 2020 authorized payments of up to \$600 per eligible adult and up to \$600 for each qualifying child under age 17. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1965 § 6428A(a)(1) (2021). The American Rescue Plan of 2021 provided more Economic Impact Payments for eligible individuals and married couples. H.R. 1319, 117th Cong. § 6428B (2021). The purpose of these measures was to alleviate financial burdens created by the pandemic through broadly applied stimulus payments,

\$16 Trillion Virus, 324 JAMA 1495–1496 (2020). See also Council of Economic Advisers, *Evaluating the Effects of the Economic Response to COVID-19* (Aug. 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/08/Evaluating-the-Effects-of-the-Economic-Response-to-COVID-19.pdf>.

² See, e.g., 166 Cong. Rec. S1897 (2020) (Sen. Collins explaining her support for the CARES Act and describing sponsoring Senators’ “joint vision ... to help small businesses and their employees make it through to the other side of this crisis by providing cashflow assistance quickly to employers who agree to keep their workers on the payroll”); 166 Cong. Rec. S1899 (2020) (Sen. Loeffler, recognizing the “acceleration of infection,” that “small businesses are closing,” and stating that Congress must “act immediately to pass the CARES Act”); 166 Cong. Rec. S2059 (2020) (Sen. Schumer, remarking that Congress’ speedy work on the CARES Act “will be worth it to save industries from the brink of collapse in order to save the jobs of hundreds of thousands of Americans in those industries”); 166 Cong. Rec. E347 (2020) (Rep. Adams, voicing his support of the CARES Act “because it provides billions in assistance to our number one job creators, our small businesses, as they look to make payroll and keep their workers employed”).

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1 tax credits, and exemptions. To that end, the federal government began issuing checks to
 2 citizens across the nation soon after the relief programs were approved by Congress.

3 32. Section 2301 of the CARES Act enacted the Employee Retention Credit
 4 (“ERC”) program, which provided a tax credit to employers whose business operations
 5 were adversely affected by COVID-19, but who nonetheless continued to pay qualified
 6 wages, including some health plan expenses, to their employees. *See* 26 U.S.C. § 3134.
 7 The statute created “a [refundable and non-refundable] credit against applicable
 8 employment taxes for each calendar quarter” in which a business was eligible. *See* 26
 9 U.S.C. § 3134(a).

10 33. Because Congress’s goal was to give businesses a financial incentive to
 11 retain employees, it drafted the statute using broad language intended to extend credit to
 12 all employees who retained their employees, notwithstanding government measures that
 13 adversely impacted commerce during the pandemic.

14 34. Congress’s goal in providing the Employee Retention Credit, as implied by
 15 the ERC’s name, was to prevent a sudden mass enrollment in public assistance programs
 16 like Unemployment Insurance and Medicare or Medicaid during the pandemic, by
 17 incentivizing employers to keep employees on payroll despite a full or partial suspension
 18 of operations or a significant decline in revenue.

19 35. Congress mandated the IRS to conduct a public information campaign to
 20 inform businesses about the ERC program and to encourage participation. Amendments
 21 to the CARES Act required the IRS to work with the Small Business Administration
 22 (SBA) to disseminate information about the tax credit.³

23 36. The IRS did not fulfill its Congressionally imposed obligation to publicize
 24 the availability of ERC payments by way of outreach to businesses. Despite qualifying
 25 under the statute, many eligible businesses remained unaware of the available tax relief
 26 well after the CARES Act was passed. Third-party tax advisory services therefore served

27 ³ *See* Consolidated Appropriates Act, 2021, Pub. L. No. 116-260, Div. EE, § 270(i)
 28 (requiring government “outreach” to business by giving “notice about the credit allowed
 under this section and the requirements for eligibility to claim the claim”).

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an important role in alerting businesses to the financial incentives associated with employee retention during the COVID-19 pandemic, by performing the outreach Congress had not.

37. Instead of publicizing the ERC program to encourage businesses' claims, the IRS has undermined its success through a fear mongering campaign. In March 2023, the IRS added claims about the ERC program to its "Dirty Dozen" list of "tax scams."⁴ The Service later announced a "Voluntary Disclosure Program" meant to encourage taxpayers to pay back ERC they had already received but that they now believed might not have been owed to them. The IRS incentivized that program by requiring disclosing taxpayers to pay back only 80% of the total ERC received.⁵ Over the past few months, the IRS has also scheduled public meetings to discuss the "freeze on ERC claims," hosted by members of the IRS Office of Criminal Investigation.⁶

38. The IRS's characterization of ERC as attracting fraud, scams, and ineligible claims is informed by its unlawful requirements for eligibility imposed by Notice 2021-20. Those positions have caused qualified, eligible StenTam clients to needlessly repay, withdraw, or reverse their ERC claims.

39. Although the moratorium on processing remains in place indefinitely, a business can still retroactively seek relief under the ERC for prior quarters in which that business was eligible for the credit by filing an IRS Form 941-X (Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund).

⁴ See IR-News Rel. 2023-49, *IRS opens 2023 Dirty Dozen with warning about [ERC] claims; increased scrutiny follows aggressive promoters making offers too good to be true*, IRS.Gov (Mar. 20, 2023), <https://tinyurl.com/IR-2023-49> ("In a further warning to people and businesses, the Internal Revenue Service added widely circulating promoter claims involving the Employee Retention Credits as a new entry in the annual Dirty Dozen list of tax scams.").

⁵ See *Employee Retention Credit – Voluntary Disclosure Program*, IRS.gov (last updated Mar. 23, 2024), <https://www.irs.gov/coronavirus/employee-retention-credit-voluntary-disclosure-program>.

⁶ See IR-News Rel. 2023-201, *Free IRS webinar shares latest details on the [ERC] including options for withdrawing or correcting previously filed claims amid aggressive marketing*, IRS.gov (Oct. 31, 2023), <https://tinyurl.com/IR-2023-201>.

B. The Text of Section 3134 Provides for Widespread ERC Eligibility.

40. The text of Section 3134 provides for a credit against applicable employment taxes paid by an “eligible employer” in each relevant quarter of 2020 and 2021.

41. The credit payable to each “eligible employer” is equal to a set percentage of qualified wages the employer paid in the relevant quarter. *See* 26 U.S.C. § 3134(a). As originally enacted, the statute limited the credit to 50 percent of qualified wages per quarter, but Congress later amended the law to increase the credit to 70 percent of qualified wages per quarter. *See* 26 U.S.C. § 3134(a).

42. Congress defined “eligible employer” in Section 3134(c)(2). For any quarter subject to ERC in which a business was operational, the business may qualify as an “eligible employer” under the ERC program in any one of three possible ways:

a. First, a business qualifies if it “is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19).” 26 U.S.C. § 3134(c)(2)(A)(ii)(I).

i. For this first prong, Congress chose not to include a requirement that the relevant government order directly regulate the fully or partially suspended business. *See generally* 26 U.S.C. § 3134. That is, Congress did not restrict the “orders from an appropriate governmental authority” referred to in the statute to those that directly ordered businesses to close. Instead, Congress purposefully used broad language to encompass all government orders that in any way limited “commerce, travel, or group meetings” due to COVID-19. *See* 26 U.S.C. § 3134(c)(2)(A)(ii)(I). Thus, the language in Section 3134(c)(2)(A)(ii)(I) extends to businesses that were constructively suspended through a comprehensive regulatory

scheme comprised of federal, state, and local orders that limited commerce, travel, and group meetings with the intent to stop the spread of COVID-19 at the cost of commercial interests. The language chosen by Congress reflects its intent to address the effects of a variety of governmental orders on a broad scale.⁷

ii. Congress also did not set a minimum threshold or magnitude of loss necessary for a suspension to qualify as “partial” under this first prong. *Id.* Instead, Congress once again chose to use broad language in an effort to extend financial relief to businesses forced to suspend operations in any part as a result of one or more of the many governmental orders that shuttered the economy.

b. Second, a business qualifies as an “eligible employer” if it suffered a certain diminution of business during the pandemic—for any reason. *See* 26 U.S.C. § 3134(c)(2)(A)(ii)(II). In contrast with the first avenue for ERC eligibility, Congress chose to impose specific numerical thresholds businesses must meet to qualify under this second prong, limiting eligibility to circumstances in which “the gross receipts ... of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019.”

c. Under the third and final prong, a business qualifies as an “eligible employer” if it meets the statute’s definition of a “recovery startup business.” *See* 26 U.S.C. § 3134(c)(2)(A)(ii)(III).

⁷ *See* 166 Cong. Rec. S1897 (2020) (Senator Collins recognizing, as relevant to the CARES Act, that “96 percent of small business owners say they have already been affected by the coronavirus—not in the sense that they have become ill with it, but their customer base has simply dried up”).

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1 C. The IRS Unlawfully Issues Legislative Rules Through “Notice 2021-20.”

2 43. The CARES Act authorized the Secretary of the Treasury to “issue forms,
 3 instructions, regulations, and guidance as are necessary” for the IRS to facilitate the ERC
 4 program. *See, e.g.*, 26 U.S.C. § 3134(m).

5 44. The statutory text makes clear that Congress delegated this authority to the
 6 IRS for the purpose of facilitating the expeditious payout of employee retention credits—
 7 not to reformulate or reimagine the statute. For instance, Congress granted the IRS the
 8 limited authority to issue forms, instructions, regulations, and guidance necessary “to
 9 allow the advance payment of the credit ... based on such information as the Secretary
 10 shall require[.]” *See* 26 U.S.C. § 3134(m).

11 45. Even as to those regulations Congress authorized the IRS to impose,
 12 Congress did not exempt the IRS from the APA’s requirement that agencies follow the
 13 notice-and-comment rulemaking process. *See* 5 U.S.C. § 553(b); *see generally* 26 U.S.C.
 14 § 3134. *See also Mann Constr. v. United States*, 27 F.4th 1138, 1141–42 (6th Cir. 2022)
 15 (holding that Congress does not exempt the IRS from APA requirements when the statute
 16 does not explicitly provide such exemption).

17 46. Although Congress granted the Secretary authority to promulgate
 18 “regulations” to facilitate the ERC program, the IRS chose instead to legislate through
 19 ever-changing “guidance” in the form of internet FAQs and notices, thereby
 20 circumventing the notice-and-comment process mandated by the APA. As explained by
 21 the IRS in representative refund denials:

22 Treasury did not issue regulations addressing entitlement to, or
 23 calculation of, the ERC. Rather, consistent with statutory authority
 24 allowing the Secretary to issue “other guidance as may be necessary to
 25 carry out the purpose of the credit” ..., the Service issued guidance in
 26 coordination with Treasury in the form of Frequently Asked Questions
 27 beginning on April 29, 2020.

28 Exh. C at 17 (pg. 5 of Form 886-A).

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47. On March 1, 2021, nearly a full year after Congress passed the CARES Act, the IRS published a 102-page guidance document titled “Notice 2021-20,” which presented information in a “Question and Answer” format. *See* Exh. A.

48. The stated purpose of Notice 2021-20 was to publish the IRS’s standards for application of Section 2301 of the CARES Act, as amended by section 206 of the Relief Act. *Id.* at 1.⁸

49. The “guidance” in Notice 2021-20 materially changed the ERC program by, among other things, significantly and improperly narrowing the scope of “eligible employer[s]” under the program and imposing substantial obligations on businesses seeking to benefit from the program. *See id.* at 29–30, 33–34, 39–40, 100–01. Notice 2021-20 also defined various terms in Section 3134, identified factors or elements necessary to claim the credit, set minimum thresholds for recovery of ERC, and imposed new, related record-keeping requirements—all of which resulted in the ERC being restricted to a lesser number of businesses than originally contemplated by Congress. This “guidance” was not sourced from the Internal Revenue Code or the plain text of the CARES Act; it was created arbitrarily and capriciously *ex nihilo* by the IRS to govern and constrain payouts under the credit.

50. The IRS also improperly narrowed the universe of “government orders” that could qualify as causing full or partial business suspensions under Section 3134(c)(2). *Id.* 27–50 (defining what constitutes a full or partial shutdown under the ERC).

51. Notice 2021-20 announced that only those governmental orders that directly compelled a business closure or restriction could be considered to determine eligibility for ERC. *Id.* at 29–30. In doing so, the IRS excluded governmental orders that fully or partially suspended a business’s operations based on indirect or collateral

⁸ The Relief Act retroactively expanded the ERC, reflecting Congress’ view that not enough businesses were receiving the intended relief. The Relief Act expanded the program so that more, not less, businesses would qualify, and it increased the credit amount. Taken together, the legislative intent was clearly to have more, not less, businesses qualify under the ERC program.

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1 restrictions on commerce. *Id.* (stating that an order compelling customers shelter in place,
 2 but not directly requiring a business closure, is not an applicable governmental order). In
 3 other words, according to Notice 2021-20, an order that does not directly “relate to the
 4 suspension of an employer’s operation of its trade or business does not rise to the level of
 5 a governmental order for the purposes of the employer’s determination of its eligibility
 6 for the [ERC].” This limitation does not appear in the statutory language, and the IRS
 7 did not provide support in the Congressional record or otherwise that would indicate an
 8 intent to apply the statutory language so narrowly. The IRS’s position in Notice 2021-20
 9 is inconsistent with the purpose of the ERC program.

10 52. The IRS also concluded that a “voluntary” suspension of business could not
 11 support a claim for eligibility under the ERC. *Id.* at 29–30. Under this new standard, if
 12 a business closed due to a lack of demand or in response to governmental guidance and
 13 recommendations—rather than because of a direct closure *order*—the business is not
 14 deemed suspended by operation of a governmental order under 26 U.S.C. §
 15 3134(c)(2)(A)(ii)(I). But of course, many businesses were subject to government-
 16 mandated lockdowns that made continued operations economically infeasible.
 17 Businesses struggled when these governmental orders compelled their customer base to
 18 remain home, and many were forced to close due to severe decreases in demand. Many
 19 businesses faced a dilemma between remaining open in violation of governmental
 20 guidance, which would expose the business to liability if customers contracted COVID-
 21 19, or closing and losing both revenue and the ability to pay their employees.

22 53. Businesses’ concerns about the effect of the governmental guidance and
 23 recommendations could not be voiced in relation to the ERC program, given the lack of
 24 opportunity for public input prior to Notice 2021-20 being issued. Thus, despite the clear
 25 causal connection between lockdown orders and business closures, an affected business
 26 would not qualify as an eligible employer under Notice 2021-20, because the orders did
 27 not regulate the business directly. Exh. A at 29–30. The constructive closure from
 28 reduced business is, according to IRS, an inadequate basis to claim the credit under

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1 Section 3134(c)(2)(A)(ii)(I). Had this rule gone through the notice-and-comment
 2 process, the issue of constructive closures could have been addressed, and the IRS would
 3 have been required to, at minimum, explain its basis for discounting such closures for
 4 purposes of the program.

5 54. Even for businesses directly regulated by a qualifying order, Notice 2021-
 6 20 installs minimum thresholds for ERC eligibility by requiring that a business show more
 7 than a “nominal” disruption of business caused by the order to establish “partial
 8 suspension.” *Id.* at 27 (noting that an employer may “have a partial suspension if, under
 9 the facts and circumstances, more than a nominal portion of its business operations are
 10 suspended by a governmental order”).

11 55. Specifically, in Notice 2021-20 the IRS arbitrarily defined “nominal
 12 portion” of business operations to mean either “(i) the gross receipts from that
 13 [suspended] portion of the business operations is not less than 10 percent of the total gross
 14 receipts (both determined using the gross receipts from the same calendar quarter in
 15 2019), or (ii) the hours of service performed by employees in that portion of the business
 16 is not less than 10 percent of the total number of hours of service performed by all
 17 employees in the employer’s business[.]” *Id.* at 28. This was not a policy choice that
 18 Congress made. Absent Congress’ directive to impose a minimum threshold, the IRS
 19 lacks authority to do so.

20 56. What’s more, the IRS did not explain in Notice 2021-20 why the “ten
 21 percent” threshold set was appropriate or necessary. The IRS did not provide any bases
 22 for its decision that a business suffering from a 9.5% reduction in receipts has not suffered
 23 an adequate “partial suspension” of business, but a business suffering from a 10%
 24 reduction in receipts has. For many small businesses operating on narrow margins, a nine
 25 percent reduction in business operations is significant. The IRS did not provide any
 26 evidence that Congress intended to impose an arbitrary threshold that would operate to
 27 exclude business suffering real harm.
 28

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57. The direct order and “nominal portion” requirements are ubiquitous in Notice 2021-20 and trigger additional requirements that must be satisfied for eligibility under the ERC. *Id.* at 27, 34–40, 100.

58. For example, Notice 2021-20 imposes new regulatory duties and obligations on businesses, including StenTam. It requires employers to substantiate their eligibility for ERC by, among other things, maintaining records showing: the governmental order(s) that suspended business operations; the records the employer relied on to determine whether a governmental order had more than a nominal effect on its business operations; records the employer used to determine whether it experienced a significant decline in gross receipts; records of which employees received qualified wages and in what amounts; and, for large employers, work records, and documentation showing whether and what amount of wages the business paid to employees who were not providing services. *Id.* at 100–01.

59. Notice 2021-20 also requires each employer to maintain records showing how it calculated allocable qualified health plan expenses; the documents relied on and its analysis whether the employer is a member of an aggregated group treated as a single employer for purposes of ERC; and how aggregation of businesses impacts the claimed credit. Employers must also maintain copies of completed and submitted Form 7200s and the complete and submitted federal employment tax returns. *Id.*

60. Notice 2021-20 requires employers to independently determine whether the interruption or reduction to their business constituted “more than a nominal” disruption, as defined in the Notice, and to maintain all records used to do so. *See* Exh. A at 39 (while leaving it open-ended, the Notice includes examples of record-keeping to include documents showing: limited occupancy to provide for social distancing, required services that were performed only on an appointment basis, changes to the format of services, requirements on employees and customers to wear face coverings, and so on.); *but see id.* at 39–40 (requiring, above all else, that the governmental order must result “in a reduction in an employer’s ability to provide goods or services in the normal course of the

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1 employer's business of not less than 10 percent," and that a mask mandate for employees
 2 and customers "will not result in more than nominal effect on the business operations.")).
 3 An employer's failure to maintain supporting records could subject taxpayers to penalties,
 4 including erroneous refund penalties. *See* I.R.C. § 6676.

5 61. Under Notice 2021-20, taxpayers must maintain those records for four years
 6 after the date each tax becomes due or is paid, whichever comes later. *Id.* at 101. In yet
 7 another indication of the disconnect between the IRS's unlawful Notice 2021-20 and the
 8 statutory text, the four-year retention period differs from the applicable five-year statute
 9 of limitation for examining the credit. *See* 26 U.S.C. § 3134(l).

10 62. The IRS has modified, expounded on, and purported to clarify Notice 2021-
 11 20 since issuing the "guidance," including by way of Notice 2021-23, Notice 2021-33,
 12 Notice 2021-49, and Notice 2021-65.

13 63. None of these IRS Notices were subjected to the notice-and-comment
 14 rulemaking process. The IRS provided no opportunity for public comment that would
 15 have alerted the IRS to the challenges and irrationality in the rules and limitations it
 16 ultimately selected. Further, the absence of the rule-making process allowed the IRS to
 17 circumvent its obligation to explain the basis for its rules, thereby depriving the Court of
 18 the ability to discern whether the rules are rationally related to the facts before the IRS.

19 64. As a result of the IRS bypassing the notice-and-comment process, the
 20 Notices lack the transparency those required administrative procedures are meant to
 21 provide. Because administrative agencies operate outside the scrutiny of the electorate,
 22 and administrative rules are not promulgated by elected officials, the rulemaking
 23 procedures guaranteed by Congress in 5 U.S.C. § 553 are essential safeguards that enable
 24 direct public participation. Here, adhering to the rulemaking process with respect to the
 25 ERC would have benefited both the agency and the public.

26 65. The IRS's choice to forego the important (and mandated) rulemaking
 27 process resulted in an unlawful narrowing of the employee retention credit that conflicts
 28 with Congressional intent and the plain language of the Act.

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66. The IRS indicates that Notice 2021-20 will apply to businesses currently awaiting a decision on their ERC claims, and to prospective claims under the ERC that have not yet been filed but are still eligible. Therefore, the unlawfully promulgated Notice 2021-20 continues to limit StenTam clients' rights to receive some or all of the tax credits they would otherwise be owed and, in turn, the direct revenue to StenTam for its ERC-related services.

67. The IRS has successfully used Notice 2021-20 and the Moratorium to deter the filing of new ERC claims as reflected by the substantially reduced number of new claims filed since September 14, 2023.

D. The IRS Treats Notice 2021-20 as Having the Force of Law.

68. The IRS has published a series of legal memoranda and information letters to Congress treating Notice 2021-20 as binding legal authority.⁹

69. Legal memoranda published by the IRS's Office of Chief Counsel concerning the application of ERC have referenced Notice 2021-20 as operative "law" alongside the language of the statute.¹⁰ The IRS relies on Notice 2020-21 as an operational rule that defines eligibility under the ERC. *See id.* at 12 (citing Notice 2021-20 as legal authority alongside other Treasury regulations, including Treas. Reg. § 31.6001-1 and 1.6001-1); *id.* at 12 (explaining that "To fall within the provisions of ... Notice 2021-20, the determination of whether an employer experienced a full or partial suspension of operations depends upon whether more than a nominal portion of an

⁹ *See, e.g.*, C.A.M. 2023-005, 2023 WL 4701979 (July 21, 2023) (explaining that Notice 2021-20 governs and provides limited exceptions for certain employers); C.A.M. 2023-007, 2023 WL 7296104 (Nov. 3, 2023) (noting that businesses can claim ERC only if they "fall within the provisions" of the Notice 2021-20); IRS Information Letter, 2023-0005, 2023 WL 5319790 (June 30, 2023) (in an IRS letter to Rep. Cartwright, the agency provided clarification "about income tax filing rules related to the employee retention credit[.]" referencing Notice 2021-20 along with the statutory law as a source of authority) (emphasis added); IRS Information Letter, 2023-0001, 2023 WL 2859099 (Mar. 31, 2023) (in an IRS letter to Senator Cornyn, the agency noted that it "has rules and regulations in place" and those "rules help ensure the proper withholding and payment of employment taxes," and citing only Notice 2021-20 in support of that position).

¹⁰ *See* C.A.M. 2023-007 (Nov. 3, 2023).

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1 employer's trade or business operations was suspended by a governmental order or a
 2 governmental order had more than a nominal effect on an employer's trade or business
 3 operations"). IRS counsel has therefore publicly proclaimed that eligibility under the
 4 ERC depends on whether a business "fall[s] within the provisions of Notice 2021-20."
 5 *Id.* at 12, 13.

6 70. The agency uses Notice 2021-20 as its primary source for interpretation of
 7 the ERC eligibility criteria when evaluating claims.

8 71. The IRS therefore relies on Notice 2021-20 as authoritative law when
 9 denying ERC claims. *See, e.g.*, Exh. C at 17–18, 23–29; ERC Disallowance, Exh. D at 4
 10 (The IRS instructing that "To the extent ... legislation did not modify the original
 11 provisions of the ERC, Notice 2021-20 governs the ERC for all periods.").

12 72. The IRS provides its substantive basis for disallowances in a Form 866-A
 13 (Explanation of Items). In those documents, the IRS has stated that Notice 2021-20
 14 governs the outcome.

15 73. For instance, in multiple disallowances issued to StenTam clients, the IRS
 16 relied on specific sections in Notice 2021-20 as legal justification for denying Plaintiff's
 17 ERC submission. *See, e.g.*, Exh. C at 24 (12 of Form 866-A) (citing Notice 2021-20 for
 18 the agency's rule concerning governmental orders); *see also id.* at 24-29 (relying on
 19 Notice 2021-20).

20 74. On information and belief, the IRS has consistently relied on Notice 2021-
 21 20 and cited noncompliance with the Notice as a legal basis to deny other refund claims
 22 under the ERC program, as well. Notice 2021-20 has therefore altered the rights and
 23 obligations of regulated employers and, in turn, imposed challenges on tax preparation
 24 providers and consultants as they manage uncertainties caused by the IRS's failure to
 25 follow the APA in promulgating legislative rules.

26 75. Official publications make clear that IRS agents must follow Notice 2021-
 27 20 when evaluating refund claims under the ERC.
 28

E. The IRS Abruptly and Indefinitely Suspends Processing of ERC Claims.

76. On September 14, 2023, the IRS announced, via press release on its website, “an immediate moratorium through at least the end of the year on processing new claims for the pandemic-era relief program....” *See* Exh. B at 1 (Moratorium News Release).

77. The IRS offered no assurance that its unilateral moratorium would end at the start of 2024. And by early 2024, the Service still had not resumed processing new ERC claims.

78. More recently, the IRS extended its moratorium “into late spring.”¹¹ But as of the date of this filing, the IRS still has not ended or provided an end-date for the moratorium. Instead, the Service continues to violate the plain language of the CARES Act by refusing to process any claims submitted since the moratorium’s start date. As to any claims submitted before the moratorium began, the IRS openly acknowledged it continues to process them, but at a “greatly reduced speed.”

79. As with Notice 2021-20, the IRS moratorium was not subjected to the notice-and-comment rulemaking process, and the text of Section 3134 does not provide for such a moratorium. The agency provided no opportunity for stakeholders to be heard and first announced the moratorium in a press release published to its website.

80. Although Congress afforded the Secretary of the Treasury authority to issue “forms, instructions, regulations, and other guidance” that were necessary to carry out the ERC program (*see* 26 U.S.C. § 3134(m)), Congress never delegated to the Department of the Treasury legislative authority to unilaterally suspend or terminate the ERC program.

81. As its basis for the moratorium, the IRS cited “growing concerns inside the tax agency, from tax professionals as well as media reports that a substantial share of new

¹¹ *See* IR-News Rel. 2024-78, *IRS Employee Retention Credit compliance effort tops \$1 billion threshold since fall; Voluntary Disclosure Program suspended after March 22, special withdrawal program remains open as audits, investigations intensify* (Mar. 22, 2024), <https://tinyurl.com/IR-2024-78> (“A specific resumption date hasn’t been determined but, at this point, the IRS anticipates it will be sometime in late spring”).

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claims from the aging program are ineligible...” *Id.* The agency then cautioned would-be “ineligible” filers to review the IRS’s unlawfully promulgated legislative rules to “help[] determine ERC eligibility, including [the] frequently asked questions” in Notice 2021-20. *Id.* at 2. Thus, once again, the agency held out its Notice 2021-20 as legislative rule, even though the Notice was not subject to the mandatory notice-and-comment procedures of the APA.

82. The Service’s unlawful legislative rules, such as Notice 2021-20, provided the impetus for its unlawful moratorium. This is made evident by the bases the IRS cites for its concern about ineligible claims. For example, the Service recently admonished businesses about “special warning signs that an ERC claim may be questionable to help businesses that may need to resolve incorrect claims.”¹² Among those red flags include IRS concerns with tax filers relying on “[g]overnment orders that don’t qualify” and “businesses citing supply chain issues.” *Id.* Both of those conditions reflect the Service’s narrowing of 26 U.S.C. § 3134 through Notice 2021-20.

83. The IRS’s complaint about purportedly “ineligible” ERC claimants is a self-fulfilling prophecy. First the IRS unlawfully narrowed the eligibility criteria for ERC claims through Notice 2021-20 and now alleges that a greater percentage of filings are “incorrect” or “questionable” under that same unlawfully issued, narrowed criterion.

84. On information and belief, IRS agents have stopped processing pending and incoming ERC claims. IRS employees have stated that the moratorium precludes all action on those inbound submissions.

85. Congress has consistently supported the ERC program, and the Biden administration actively encouraged businesses to take full advantage of the credit.¹³ But

¹² IR-News Rel. 2024-85, *Dirty Dozen: Beware of aggressive promoters who dupe taxpayers into making questionable [ERC] claims; risks continue for small businesses, special withdrawal program remains available* (Mar. 29, 2024), at <https://tinyurl.com/IR-2024-85>.

¹³ See, e.g., White House, *Fact Sheet: President Biden Announces Additional Steps to Help Americans Return to Work* (May 10, 2021), <https://tinyurl.com/FactSheet-WhiteHouse> (“[T]he Biden-Harris Administration is working to increase awareness of and participation in this beneficial program”); Carmen Reinicke, *Biden encourages*

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the IRS confronted burdens when administrating the program, and soon began discouraging businesses from claiming the credit.

86. Congress enacted a broad measure in 26 U.S.C. § 3134. To be sure, the scope of that program may have grown larger than forecasted. But regardless of any pitfalls faced by the ERC program, the IRS has no authority to simply stop processing ERC claims of businesses that may be rightfully entitled to refunds under Section 3134. Only the legislature can speak to those remedial measures.

87. The IRS has not established that the incoming rate of new ERC claims in late 2023 was greater than at other times during the life of the ERC program.

88. The IRS has also not shown that the rate of purported abuse within the ERC program is materially different from rates of abuse under other common tax programs.

89. As a whole, IRS processed 262,829,039 total tax returns in 2022.¹⁴ According to the IRS, the Service closed 708,309 general tax return audit investigations in 2022, resulting in nearly \$30.2 billion in recommended additional tax.¹⁵ In that same time frame, 1,595,277 employers submitted ERC claims in 2022.¹⁶ IRS claimed that it received 3.6 million ERC claims leading into the moratorium. *See* Exh. B at 3. But as of summer 2023, when the IRS decided to proceed with a moratorium, the IRS had announced 252 investigations, resulting in 15 federally charged cases, 6 convictions, and 4 sentencings with an average sentence of 21 months per offender. *Id.* Even if those numbers are underinclusive, several hundred investigations out of nearly 3.6 million claims does not facially reflect defects with the ERC program justifying a complete cessation of the program.

businesses to take advantage of the employee retention credit, CNBC.com (May 12, 2021), <https://tinyurl.com/CNBC-Reinicke>.

¹⁴ *See IRS Data Book, 2023* (Apr. 2024) at 4, table 2, <https://www.irs.gov/pub/irs-pdf/p55b.pdf>.

¹⁵ *See SOI Tax Stats – Examination Coverage: Recommended Additional Tax, and Returns with Unagreed Additional Tax, After Examination, by Type and Size of Return – IRS Data Book Table 18*, IRS.gov (last updated Apr. 18, 2024), <https://tinyurl.com/Table-18>.

¹⁶ *See IRS Data Book, 2022* at 75, <https://www.irs.gov/pub/irs-pdf/p55b.pdf>.

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90. The numbers have remained consistent since the moratorium began. Of the 352 criminal investigations concerning ERC initiated by IRS, only 18 have resulted in charges. Just 11 of those charges resulted in conviction.¹⁷

91. As of March 2024, the IRS has been able to identify 22,000 claims that it viewed as “improper” under the ERC, which represents less than 1% of the total claims filed.¹⁸

92. As the moratorium drags on into its eighth month, the IRS is sitting on billions in ERC funds that Congress intended to be distributed to American businesses, and interest on the delinquent payment to businesses continues to accumulate. Yet the IRS refuses to process new claims, regardless of whether claimants would be eligible for ERC under the statute.

93. Taxpayers have a Congressionally established “right” to pay only the correct amount of tax owed. *See* 26 U.S.C. § 7803(C). That necessarily includes the right to a refund of amounts overpaid, including money retroactively deemed overpaid by way of the ERC program.

94. The IRS has a Congressionally established obligation to process taxpayers’ claims for ERC, and to refund amounts overpaid based on application of the ERC.

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¹⁷ *See* IR-News Rel. 2024-21, *IRS continues work on Employee Retention Credit; new IRS CI education sessions come as agency urges businesses to review VDP, withdrawal program for questionable claims* (Jan. 25, 2024), <https://tinyurl.com/IR-2024-21>.

¹⁸ *See* IR-News Rel. 2024-78, *IRS Employee Retention Credit compliance effort tops \$1 billion threshold since fall; Voluntary Disclosure Program suspended after March 22, special withdrawal program remains open as audits, investigations intensify* (March. 22, 2024), <https://tinyurl.com/IR-2024-78>.

1 **IV. CAUSES OF ACTION**

2 **COUNT ONE**

3 **Violation of the APA's Notice-and-Comment Rulemaking Requirement**
 4 **[5 U.S.C. § 553]**

5 95. StenTam re-alleges and incorporates by reference the paragraphs set forth
 6 above.

7 96. The APA provides that “[a] person suffering legal wrong because of agency
 8 action, or adversely affected or aggrieved by agency action within the meaning of the
 9 relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

10 97. The Court may therefore “hold unlawful and set aside agency action,
 11 findings, and conclusions found to be . . . without observance of procedure required by
 12 law.” 5 U.S.C. 706(2)(D).

13 98. Agency rules can be “interpretative” or “substantive.”

14 99. Substantive, also called “legislative” rules, impact rights and obligations
 15 and have the force and effect of law. Legislative rules therefore impose new rights or
 16 obligations on the regulated class and can change a party’s legal status. *See United States*
 17 *v. Managort*, 312 F. Supp. 3d 60, 75 (D.D.C. 2018).

18 100. When evaluating whether a rule is “legislative,” Courts broadly consider
 19 whether the rule imposes new obligations. The imposition of even minor duties, such as
 20 recordkeeping requirements, is grounds to deem a rule legislative. *See Green Valley Invs.,*
 21 *LLC v. Comm’r of Internal Revenue*, No. 17379-19, 2022 WL 16834499, *5 (T.C. Nov.
 22 9, 2022) (finding that the IRS imposed new duties in the form of reporting obligations
 23 and recordkeeping requirements, and are “hallmarks of a legislative, not an interpretive
 24 rule.”).

25 101. The APA requires that certain rules promulgated by an agency must be
 26 published following specified notice-and-comment procedures. 5 U.S.C. § 553.
 27 “Substantive” or “legislative” rules are subject to the APA’s notice-and-comment
 28 procedures. *See* 5 U.S.C. § 553.

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102. An agency’s failure to meet those obligations is grounds to invalidate a substantive rule. *Mann Constr., Inc. v. U.S.*, 27 F.4th 1138, 1148 (6th Cir. 2022); *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2021); *Bullock v. Internal Revenue Serv.*, CV-18-103, 2019 WL 3423485, (D. Mont. July 30, 2019).

103. Under the APA, the court shall set aside agency action that is “without observance of procedure required by law.” *See* 5 U.S.C. § 706(2)(D).

104. The IRS has given Notice 2021-20 the force and effect of law.

105. The IRS did not issue a notice of proposed rulemaking describing the proposed rules it intended to implement through Notice 2021-20.

106. The IRS did not give the public the opportunity to submit comments on the rules ultimately adopted in Notice 2021-20.

107. The IRS did not provide a clear statement of the basis and purpose of the extensive rules found in Notice 2021-20.

108. Notice 2021-20 creates new substantive duties and restrictions by, among other things, requiring employers to substantiate and document eligibility under the ERC; promulgating new legislative standards for application of the ERC that materially narrow eligibility for the credit; and by imposing document and data retention requirements on taxpayers and those submitting claims on their behalf.

109. Notice 2021-20 is not an interpretative rule under 5 U.S.C. § 553(b)(3)(A).

110. Notice 2021-20 is a substantive rule under 5 U.S.C. § 553(b)(3)(A).

111. One year before the nationwide shutdowns under COVID-19, the Department of the Treasury and the IRS published a policy statement purporting to “reaffirm their commitment to a tax regulatory process that encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law.” Exh. E at 1 (Dept. of Treasury Policy Stmt.). The IRS acknowledged that “[t]he best practice for agency rulemaking is the notice-and-comment process established by the [APA].” *Id.* The IRS committed to follow notice-and-comment procedures even for interpretive rules. *Id.* (pledging that “IRS will continue to adhere to their longstanding

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1 practice of using the notice-and-comment process for interpretive tax rules published in
 2 the Code of Federal Regulations.”).

3 112. Despite recognizing that guidance documents should not have the force of
 4 law, the IRS has held out Notice 2021-20 as a purported rule with the force and effect of
 5 law. *Compare* Exh. D at 4 *with* Exh. E at 2.

6 113. Notice 2021-20 makes no showing of good cause legally sufficient to avoid
 7 notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b)(3)(B). The IRS issued Notice
 8 2021-20 one year after the CARES Act. It’s failure to engage the proper rulemaking
 9 process did not result from an exceptional circumstance. *See* Exh. E at 2.

10 114. The agency has yet to begin a rulemaking despite the passage of three years.

11 115. The IRS and Treasury failed to comply with 5 U.S.C. § 553 when issuing
 12 the rules found in Notice 2021-20. The IRS’s Notice 2021-20 is therefore unlawful.

13 116. The notice-and-comment procedures would have fostered a productive
 14 exchange of information and public input on material points. That process would have
 15 caused changes in the IRS’s positions. It would have at least provided the statutorily
 16 mandated transparency and explanation for IRS’s substantive positions, which is
 17 necessary for the courts to evaluate whether a rule is supported by a rational basis or is
 18 arbitrary and capricious.

19 117. The IRS’s failure to abide by the APA injures StenTam. Notice 2021-20
 20 subjects StenTam clients to unreasonable and unexplained standards for ERC refund
 21 applications, which limits StenTam’s ability to counsel and assist clients. As a tax
 22 preparer focusing on ERC claims, StenTam is directly impacted by Notice 2021-20.

23 118. But for Notice 2021-20, StenTam would have secured additional ERC
 24 refunds for its clients under 26 U.S.C. 3134(c)(A)(ii)(I) and (II). Moreover, by narrowing
 25 the eligibility criteria for ERC claims, Notice 2021-20 continues to impede StenTam’s
 26 tax advisory services.

27 119. StenTam invested substantial resources to respond to the new obligations
 28 imposed by Notice 2021-20, which included, for example, collection of records,

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1 implementing compliance policies, and altering processing policies for prospective and
 2 current ERC claims. Those measures would not otherwise be necessary if Notice 2021-
 3 20 was invalidated. *See, e.g., City of Clarksville v. Fed. Energy Regul. Comm'n*, 888 F.3d
 4 477, 481-82 (D.C. Cir. 2018) (“imposition of new regulatory obligations, in and of itself,
 5 is sufficient to establish standing”); *Am. Tunaboat Ass’n v. Ross*, 391 F. Supp. 3d 98, 108
 6 (D.D.C. 2019) (“Regulated entities have concrete interests in both (1) being able to meet
 7 their regulatory responsibilities; and (2) in avoiding unwarranted regulatory obligations”).

8 120. Plaintiff asks that the Court set aside Notice 2021-20 as an invalid exercise
 9 of IRS authority.

10 121. Plaintiff also seeks a mandatory, nationwide injunction barring the IRS
 11 from enforcing the unlawfully promulgated Notice in any administrative forum or
 12 proceeding.

13 122. Plaintiff does not seek to enjoin, impede, or restrain the collection of any
 14 tax. Plaintiff does not seek any refund of taxes or credits for any clients through this
 15 Count, and instead limits its challenge to the IRS’s failure to meet APA requirements
 16 under 5 U.S.C. § 553. *See CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582,
 17 1588 (2021).

18 **COUNT TWO**
 19 **Arbitrary & Capricious Agency Action**
 20 **[5 U.S.C. § 706(2)(A)]**

21 123. StenTam re-alleges and incorporates by reference the paragraphs set forth
 22 above.

23 124. “The APA’s arbitrary and capricious standard requires that agency action
 24 be reasonable and reasonably explained.” *Fed. Commc’ns Comm’n. v. Prometheus Radio*
 25 *Project*, 141 S.Ct. 1150, 1158 (2021). An agency must reasonably consider the relevant
 26 issues and reasonably explain their decisions. *Id.*; *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
 27 *v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 30 (1983) (agency action is arbitrary and
 28

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1 capricious if the agency fails to “articulate a satisfactory explanation for its action
 2 including a rational connection between the facts found and the choice made.”).

3 125. Agency action is arbitrary and capricious “if it exhibits internally
 4 inconsistent reasoning.” *Braeburn v. U.S. Food and Drug Admin.*, 389 F. Supp. 3d 1, 28
 5 (D.D.C. 2019) (citing *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

6 126. The 102-page Notice 2021-20 is arbitrary and capricious because the IRS
 7 relied on factors Congress had not intended it to consider, ignored important aspects of
 8 the problem, and fashioned rules that were not supported by transparent and reasoned
 9 decision-making. *Supra* Section III.B.

10 127. The IRS provided no explanation or reasoning for choosing certain
 11 eligibility requirements over others. For example, the agency never explained why a 10%
 12 effect on business was beyond a “nominal” disruption, but a 9% reduction was not. The
 13 IRS failed to explain why a governmental order that required businesses to adopt social
 14 distancing measures could render a business eligible, but an order that prevents customers
 15 from even visiting that same business would not similarly qualify. Exh. A at 24–25 (Q/A
 16 No. 11), 29 (Q/A No. 13). In fact, the IRS did not explain any of its limitations in Notice
 17 2021-20.

18 128. The Notice 2021-20 factors also show inconsistencies in the application of
 19 various factors affecting an employer’s eligibility. For instance, Notice 2021-20 provides
 20 factors for determining whether a business’s operations were more than nominally
 21 affected through, *inter alia*, changes to the format of certain services, including “requiring
 22 employees and customers to wear face coverings.” *See* Exh. A at 39 (stating that
 23 “Whether a modification ... has more than a nominal effect on the business operations is
 24 based on the facts and circumstances.”). But after directly stating that such modifications
 25 might be qualifying case-by-case, the Notice then takes the contradictory, categorical
 26 position that such “[m]odifications altering customer behavior (for example, mask
 27 requirements...)” ... will not result in more than a nominal effect on the business
 28

operations.” *Id.* at 40. Absent the agency’s explanation (which was not provided), the IRS positions are definitionally arbitrary.

129. Because the IRS has taken substantive positions which are arbitrary and capricious, the Court should enjoin the IRS from either enforcing the terms of Notice 2021-20 or from mandating compliance with that notice.

130. Plaintiff does not seek to enjoin, impede, or restrain the collection of any tax. Plaintiff does not seek any refund of taxes or credits for any clients through this Count, and instead limits its challenge to the IRS’s failure to meet APA requirements under 5 U.S.C. § 553. *See CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1588 (2021).

COUNT THREE
Unlawful Agency Action in Excess of Statutory Jurisdiction, Authority, or
Limitations, or Short of Statutory Right
[5 U.S.C. § 706(2)(A) & (C)]

131. StenTam re-alleges and incorporates by reference the paragraphs set forth above.

132. The publication of Notice 2021-20 is a final agency action.

133. Agency positions must conform to the scope of Congressional mandates. When an agency claims to impose decisions of vast economic and political significance, the courts require that agency to identify a clear Congressional command enabling that interpretation. *Id.* (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)). When evaluating whether the agency’s chosen rule or policy fits within the statutory scheme, the court must look at the entire statutory context—not just isolated words in a vacuum. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). “[T]he Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power.” *See Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring). “The [major questions] doctrine serves as an interpretive tool reflecting ‘common sense as to the manner in which Congress is likely

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1 to delegate a policy decision of such economic and political magnitude to an
 2 administrative agency.” *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133).

3 134. The APA requires courts to “hold unlawful and set aside agency action”
 4 that is “not in accordance with law,” “contrary to constitutional right, power, privilege,
 5 or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of
 6 statutory right[.]” 5 U.S.C. § 706(2)(A)-(C).

7 135. IRS Notice 2021-20 violates 5 U.S.C. § 706(2)(A) and (C) because it
 8 imposes arbitrary thresholds and obligations (e.g., a 10% threshold for “nominal” effects
 9 on a business) without explanation, inconsistent with Congressional intent, and without
 10 Congressional authority.

11 136. The IRS does not explain why the threshold requirements and factors
 12 imposed by Notice 2021-20 are necessary per the CARES Act.

13 137. While Congress authorized the Secretary of Treasury to “issue such forms,
 14 instructions, regulations, and other guidance as are necessary to allow the advance
 15 payment of the credit,” it did not authorize the Secretary to issue legislative rules outside
 16 of the APA, or to limit the scope of eligible taxpayers under the statute.

17 138. IRS Notice 2021-20 has a substantial economic impact. The IRS claims to
 18 have received “approximately 3.6 million” ERC claims over the course of the program.
 19 Exh. B at 3. The IRS has used Notice 2021-20 as a basis to deny hundreds of millions of
 20 dollars in economic relief that Congress directed to businesses harmed during the
 21 pandemic. Under the ERC program, the IRS presides over billions of dollars in
 22 emergency relief funding. An IRS rule that substantially narrows that statutory scheme
 23 implicates the major questions doctrine.

24 139. The text of the CARES Act is clear and unambiguous. Because Notice
 25 2021-20 adopts substantive positions inconsonant with Congressional command, the
 26 agency acted beyond its authority. The text of the CARES Act does not authorize the IRS
 27 to impose requirements or conditions on taxpaying employers that would substantially
 28 narrow the scope of eligible businesses under the ERC program.

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140. Congress specifically defined “eligible employers” using broad language consistent with the legislative goal of sustaining businesses during and after the historic pandemic. *See* 26 U.S.C. § 3134(C)(2). As alleged, *supra*, Section III.B, the IRS’s alterations in Notice 2021-20 are not apparent from the plain text of the CARES Act or its amending legislation. Congress did not give the IRS authority to create threshold requirements for a business to qualify as an “eligible employer.”

141. Congress broadly defined governmental orders that would qualify under the ERC statute. *Supra* Section III.A. Section 3134 describes orders limiting group meetings for “social, religious, or other purposes”. 26 U.S.C. § 3134(c)(2)(A)(ii)(I). The plain language of the statute includes orders that impact businesses broadly, rather than just orders specifically directed at businesses. *See id.* Further, Congress’s amendments to the law are evidence of legislative intent, extending the ERC by making it easier, not harder, for employers to qualify for the credit. *See* The Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1965; The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. § 6428B; The Infrastructure Investment and Jobs Act of 2021, Pub. L., 117-58, 135 Stat. 429 (Nov. 15, 2021).

142. The IRS altered the scope of eligible governmental orders, replacing Congress’s unambiguous definition with its own that significantly narrowed employer eligibility. *Compare* 26 U.S.C. § 3134(2)(A)(ii)(I) *with* Exh. A at 25–26.

143. The IRS Notice 2021-20 exceeds the boundaries and purpose of the CARES Act by unduly narrowing the universe of “eligible employers” under 26 U.S.C. § 3134(c)(2) in several material respects. *See supra* Section III.B; *see also Biden*, 143 S.Ct. at 2369-70 (holding that Dept. of Education exceeded statutory authority by enacting a plan that “augments and expands” the law).

144. By exceeding statutory authority, Defendants have also violated the constitutional separation of powers.

145. The Court should invalidate and strike Notice 2021-20 and enjoin the IRS from enforcing the terms of that Notice in any administrative or judicial forum.

1 146. Plaintiff does not seek to enjoin, impede, or restrain the collection of any
 2 tax. Plaintiff does not seek any refund of taxes or credits for any clients through this
 3 Count, and instead limits its challenge to the IRS's failure to meet APA requirements
 4 under 5 U.S.C. § 553. *See CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582,
 5 1588 (2021).

6 **COUNT FOUR**
 7 **Ultra Vires Action in Violation of the APA**
 8 **[5 U.S.C. §§ 706(1) and 706(2)(C)]**

9 147. StenTam re-alleges and incorporates by reference the paragraphs set forth
 10 above.

11 148. Agency action is unlawful under the Administrative Procedure Act (5
 12 U.S.C. § 706(2)(C)) when “in excess of statutory jurisdiction, authority, or limitations, or
 13 short of statutory right[.]”

14 149. Under 5 U.S.C. § 706(1), the Court has jurisdiction and authority to
 15 “compel agency action unlawfully withheld or unreasonably delayed[.]” The IRS's
 16 refusal to process new ERC claims is agency action unlawfully withheld.

17 150. The IRS's moratorium unilaterally suspended the ERC program for all new
 18 filers to the prejudice of those businesses with legitimate ERC claims.

19 151. The moratorium violates Section 706(2)(C) because IRS lacks statutory
 20 authority to unilaterally terminate the ERC program in conflict with Congressional
 21 command in 26 U.S.C. § 3134.

22 152. The Moratorium is final agency action because it marks the consummation
 23 of the agency's decision-making process on this point. The IRS has not abated or
 24 reconsidered the moratorium in the seven months since it became effective.

25 153. The Moratorium has a future and present effect.

26 154. The Moratorium was a legislative act that violates the non-delegation and
 27 separation of powers doctrines.

28 155. It is actionable under 5 U.S.C. § 706(1) because, under the CARES Act, the

1 IRS has a clear, certain, and mandatory duty to process refund claims under the ERC.

2 156. The CARES Act states that “[i]n the case of an eligible employer, there
 3 shall be allowed as a credit against applicable employment taxes for each calendar quarter
 4 an amount equal to 70 percent of the qualified wages with respect to each employee of
 5 such employer for such calendar quarter.” 26 U.S.C. § 3134(a) (emphasis added); *Abreu*
 6 *v. United States*, 796 F. Supp. 50, 53 (D.R.I. 1992) (holding that mandatory language in
 7 a statute imposes a clear duty: “There can be no doubt as to the mandatory language in
 8 the statute”).

9 157. The Act adds that “If the amount of the credit under subsection (a) exceeds
 10 the limitation of paragraph (2) for any calendar quarter, such excess shall be treated as an
 11 overpayment that shall be refunded under sections 6402(a) and 6413(b).” 26 U.S.C. §
 12 3134(b)(3) (emphasis added).

13 158. 26 U.S.C. § 6402(a) states that, “In the case of an overpayment, the
 14 Secretary ... shall, subject to subsections (c), (d), (e), and (f), refund any balance to such
 15 person.” (emphasis added).

16 159. Similarly, 26 U.S.C. § 6413(b) states that “...the amount of the
 17 overpayment shall be refunded in such manner and at such times (subject to the statute of
 18 limitations properly applicable thereto) as the Secretary may by regulations prescribe.”
 19 (emphasis added).

20 160. Congress’s use of mandatory language must be given effect. The above
 21 statutory provisions, which repeatedly state that IRS “shall” refund taxpayers, eliminate
 22 the agency’s discretion and require the IRS to process refund claims. Congress did not
 23 make ERC refunds optional, but mandatory for eligible employers meeting the standards
 24 of the law.

25 161. Congress determined that a reasonable time for processing refund claims is
 26 within six months. *See, e.g.*, 26 U.S.C. § 6532(a)(1) (permitting suit for refund action
 27 where the IRS fails to act on refund claim “before the expiration of 6 months from the
 28

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1 date of filing the claim”); *Gaylor v. Mnuchin*, 919 F.3d 420, 426 (7th Cir. 2019) (“Several
 2 courts of appeals have cited the six-month filing requirement approvingly”).

3 162. Congress has also codified the Taxpayer Bill of Rights in 26 U.S.C. §
 4 7803(a)(3), which memorializes taxpayer protections. Taxpayers have “the right to pay
 5 no more than the correct amount of tax.” 26 U.S.C. § 7803(a)(3)(C). The IRS moratorium
 6 stands as an impediment to those core protections by keeping ERC refunds from
 7 businesses with legitimate claims.

8 163. The IRS understood that only an amendment to the Congressionally enacted
 9 scheme could stay or sunset the ERC program. In early 2024, the agency lobbied
 10 Congress for legislative amendments that would bar additional claims for the ERC. The
 11 agency’s efforts were memorialized in H.R. 7024, which passed in the House of
 12 Representatives on January 31, 2024. *See* H.R. 7024, Rep. No. 118-353 (118th Congress,
 13 2nd Session). Through that Bill, the IRS would have received broader authority to
 14 investigate “promoters” under the ERC. The bill would also have imposed a bar on
 15 additional claims for the ERC as of January 31, 2024—effectively memorializing the IRS
 16 moratorium on new ERC claims.

17 164. Those legislative efforts failed in the Senate. Yet the IRS continues to
 18 impose its moratorium on new ERC claims, acting unilaterally without congressionally
 19 delegated authority.

20 165. Plaintiff does not seek to enjoin, impede, or restrain the collection of any
 21 tax. Plaintiff does not seek any refund of taxes or credits for any clients through this
 22 Count. *See CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1588 (2021).
 23 Plaintiff takes no position on whether IRS must agree with any refund request under the
 24 ERC, or issue sums to specific taxpayers. Plaintiff does not ask the Court to require that
 25 IRS pay or not pay any tax claim. Plaintiff instead sues for an order requiring the agency
 26 to process those claims in the first instance.

27 166. The public needs expeditious relief. For quarters in 2020, the deadline to
 28 apply under the ERC program was April 15, 2024. For quarters in 2021, the deadline is

1 April 15, 2025. Without prompt relief, businesses with legitimate ERC claims may lose
2 their procedural outlet to pursue reimbursement.

3 167. Plaintiff requests that the Court vacate, hold unlawful, and set aside the IRS
4 Moratorium pursuant to 5 U.S.C. § 706(2)(C). The Court should issue a mandatory
5 injunction under 5 U.S.C. § 706(1) requiring the IRS to resume processing ERC claims.

6 **COUNT FIVE**

7 **Claim for Writ of Mandamus**

8 **[28 U.S.C. § 1361]**

9 **[As to Defendants Yellen and Werfel]**

10 168. StenTam re-alleges and incorporates by reference the paragraphs set forth
11 above.

12 169. Plaintiff seeks a writ of mandamus under the Mandamus Act, 28 U.S.C. §
13 1361, compelling Defendants Werfel and Yellen to perform their Congressionally
14 mandated duties and resume processing new refund claims under the ERC.

15 170. The district court has original jurisdiction in any action seeking a
16 “mandamus to compel an officer or employee of the United States or any agency thereof
17 to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361.

18 171. Defendants Yellen and Werfel are officers of federal agencies. Defendant
19 Yellen is the Secretary of the Department of the Treasury. Defendant Werfel is the
20 Commissioner of the Internal Revenue Service.

21 172. Defendants Yellen and Werfel have the authority and obligation to oversee
22 their agencies. Defendant Werfel ordered the Moratorium, thereby ceasing the IRS’s
23 processing of new refund claims under the ERC.

24 173. As alleged *supra*, ¶¶ 147-161, Congress imposed a clear, certain, and
25 mandatory duty on the IRS to process claims for refund under the ERC and, where
26 appropriate, refund money to businesses entitled to receive same under the CARES Act
27 and amendments thereto. *Id.*; 26 U.S.C. §§ 3134(b)(3), (m)(1); 5 U.S.C. § 555(b); *see*
28 *also Stang v. I.R.S.*, 788 F.2d 564, 565 (9th Cir. 1986) (“The IRS is ‘required to make the

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inquiries, determinations, and assessments of all taxes’ imposed by title 26”) (quoting 26 U.S.C. § 6201(a)).

174. IRS’s duty to process new refund claims is clear and certain. Congress mandated that action through use of compulsory language in the CARES Act. H.R. 748 § 2301(m).

175. At the very least, the IRS must process refund claims “within a reasonable time.” *See, e.g., Brian A. C. v. Kijakazi*, No. 3:21-CV-710-BN, 2022 WL 3648571, at *4 (N.D. Tex. Aug. 24, 2022) (“Although Plaintiff points to no particular time period in which the Commissioner was required to act, under Section 555(b) of the APA ..., when Congress fails to specify a time by which an adjudication should be made, ... the necessary implication is that adjudication must occur within a reasonable time.”) (internal quotations omitted).

176. Congress determined that a reasonable time for processing refund claims is within six months. *See, e.g.,* 26 U.S.C. § 6532(a)(1) (permitting suit for refund action where the IRS fails to act on refund claim “before the expiration of 6 months from the date of filing the claim”); *Gaylor v. Mnuchin*, 919 F.3d 420, 426 (7th Cir. 2019) (“Several courts of appeals have cited the six-month filing requirement approvingly”).

177. The IRS moratorium on processing ERC refund claims has exceeded six months.

178. Defendant Werfel’s duty to oversee IRS processing of those refund claims is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt. *See* 26 U.S.C. § 7803(a)(2).

179. The IRS suspension of the ERC program and refusal to process new claims conflicts with that nondiscretionary duty.

180. Plaintiff StenTam has no other adequate remedy other than a writ of mandamus requiring Defendant Werfel to perform his job function as required by Congress.

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181. Neither StenTam nor its clients can pursue relief at the administrative level during the moratorium because the IRS is not providing a pathway to exhaust administrative remedies.

182. This Count is limited to seeking an order requiring IRS to perform its nondiscretionary, ministerial duties, which the IRS has suspended under the moratorium. Through this Count V, Plaintiff does not seek a specific determination on any refund claim or require the IRS to collect any tax. Plaintiff seeks to compel the IRS to process claims through the IRS system. *See, e.g., Hu v. Reno*, No. 3-99-CV-1136-BD, 2000 WL 425174, at *3 (N.D. Tex. Apr. 18, 2000) (“Although the INS is vested with broad discretion in making the ultimate decision whether to grant an application ..., it has a non-discretionary duty to process the application. Most courts have not hesitated to exercise jurisdiction to compel the performance of this duty.”) (internal citations omitted).

183. Plaintiff requests that this Court issue a writ of mandamus compelling Defendants Yellen and Werfel to process new refund claims under 26 U.S.C. § 3134.

PRAYER FOR RELIEF:

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendants, and requests that this Court award Plaintiff the following:

- A. Enjoin Defendants from enforcing Notice 2021-20.
- B. Vacate Notice 2021-20 under 5 U.S.C. § 706(2).
- C. Declare under 28 U.S.C. § 2201 that IRS’s moratorium on processing new ERC claims violates the APA (5 U.S.C. §§ 706(1), (2)(C)).
- D. Enter a preliminary and permanent injunction under 5 U.S.C. § 706(1) requiring the IRS to resume processing new refund claims under the ERC as mandated by Congress in 26 U.S.C. § 3134.
- E. Either as an alternative to an injunction under 5 U.S.C. § 706(1), or in conjunction with same, issue a writ of mandamus requiring Defendants Yellen and Werfel

1 to resume processing new refund claims under the ERC as mandated by Congress (26
2 U.S.C. § 3134).

3 F. Any other relief that the Court deems just and appropriate.
4

5 DATED: May 14, 2024.

6 Respectfully submitted,

7
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